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JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 482

STEPHEN F. HERINGER, MABEL H. HERINGER, JOHN F. HERINGER, and ALTA G. HERINGER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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to the United States Court of Appeals for the Ninth Circuit.

Petitioners, by their counsel, pray that a writ of certiorari may issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming in part, the decision of The Tax Court of the United States.

OPINIONS BELOW.

The majority and dissenting opinions of The Tax Court are officially reported in 21 T.C. 607, and are printed in the transcript (R. 84-89). The opinion of the Court of Appeals is reported in 235 F. 2d 149-153, and is printed in Appendix A, *infra* pp. i-ix.

JURISDICTION.

The judgment of the Court of Appeals, modifying and remanding the judgment of The Tax Court, was entered on June 7, 1956, Appendix B, *infra* p. x. A petition for rehearing filed on June 29, 1956, was denied on July 9, 1956, Appendix C, *infra* p. xi. The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether the eleven outright owners—all *sui juris*—of shares of the common capital stock of this family corporation are the recipients of gifts of ". . . 'future interests' within the meaning of the statute (Section 1003 (b) (3), I.R.C. of 1939) . . ." so that the donor-petitioners are not entitled to the $3,000.00 annual exclusions for each of the eleven donee-shareowners, as therein provided.

2. Whether it is appropriate to our judicial conceptions of the fair and adequate disposition of a cause for a Court of Appeals to raise and decide a

vital and continuing issue to the taxpayers where neither on the pleadings, on brief, nor in oral argument, opportunity has been given to meet that issue.

3. Whether a decision of a Court of Appeals will be allowed to stand without adequate review when that decision casts doubt upon previously well settled law in the field of gift taxation and will provoke unnecessary litigation to taxpayers and government alike.

STATUTE INVOLVED.

Internal Revenue Code of 1939:

"Section 1003 Net Gifts.

(a) General Definition—The term 'net gifts' means the total amount of gifts made during the calendar year, less the deductions provided in Sec. 1004.

(b) Exclusions from Gifts—

(1) . . .

(2) . . .

(3) Gifts After 1942—In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1943 and subsequent calendar years, the first $3,000.00 of such gifts to such person shall not for the purposes of subsection (a), be included in the total amount of gifts made during such year."

(26 U.S.C. 1952 ed., Sec. 1003.) (I.R.C. of 1954, Sec. 2503 (a) and (b) identical except 1955 is substituted for 1943.)

STATEMENT OF THE CASE.

In the calendar years 1948 and 1949, petitioners made transfers of farming land to an wholly owned family corporation. That is, the shareowners of the corporation were the four petitioners who owned 40% of the stock and eleven children who owned 60% of the stock. The Court of Appeals has held, as was the view expressed in the dissenting opinions in The Tax Court, that there was no gift tax applicable to the 40% interest which petitioners retained in the form of stock ownership. The fundamental reason for the Court of Appeals' holding on that issue was that ". . . a direct consequence of their action was to *proportionately increase the value* of petitioners' holdings, (and that) reason and justice require a finding that the petitioners parted with no more." (Op. p. 6, *infra,* p. viii.) The economic values to the holders of 60% of the stock just as inexorably and proportionately increased, *pro tanto,* their ownership of their stock as they did that of the petitioners'. (Italics ours.)

Yet in spite of this infallible reasoning the Court of Appeals went on to clearly err in holding that ". . . *even though the said children be deemed the donees for purposes of application of § 1003 (b) the interests taken by said children were 'future interests' within the meaning of the statute and petitioners are not entitled to the exclusions there provided.*" (Op. p. 4, Appendix A, *infra,* p. v.) Simply and realistically, the Court of Appeals has thus held that the unqualified ownership through stock of 40% of the property

of a corporation have *present interests* whereas the other equally unqualified ownership of 60% of the stock *have "future interests"* in property within the meaning of the parenthetical clause of Section 1003 (b).

The reasoning and holding of the Court of Appeals will not stand honest intellectual or factual analysis. Its views violently unsettle and distort existing gift tax law. The unqualified, unconditional, separate, and sole owner, *sui juris,* of shares of stock *have never before* been held to have a "future interest" in the property of a corporation. The petitioners' 40% ownerships here have present interests. How then can any sense be made of the Court of Appeals' holding that the other 60% ownership have "future interests". It's as simple and obvious as that!

The Court of Appeals decided the issue of "future interests" not based upon the pleadings before The Tax Court, nor on any statement of points in the transcript of record before it. The only appropriate issue for adjudication before the Court of Appeals, *on the record,* was whether the children shareholders were the *real and intended donees* under the statute. The dissenting opinions in The Tax Court, and the Court of Appeals, by the above-quoted unequivocal language, stated the eleven children, severally owning 60% of the stock, *were the donees under the statute*—not the corporation.

No argument in petitioners' brief on appeal, or in oral argument was directed to the issue of "future interests," nor did any of the three judges who sat

at the Court of Appeals hearing direct any question as to a "future interest" issue, neither to counsel for the Government nor to counsel for the taxpayers. A petition for rehearing, on that issue, filed June 29, 1956 (while the Judicial Conference in the Ninth Circuit was going on), was rather startlingly denied on July 9th. A copy of that short petition is set forth in Appendix D, *infra* pp. xii-xviii.

REASONS FOR GRANTING THE WRIT.

The fifteen members of the Heringer families are plain folks and have worked hard together. They work in the production of America's basic industry—food. Vividly in this record, the parents have sought to recognize years of industry on the part of their adult children by transferring a capital interest in land to them so that those children could obtain genuine independence and still remain on the farms and cooperate in the family group job. We have indicated the Heringers are a plain and industrious people. How does the plain, no fanfare "little guy taxpayer" get his just cause across to the attention and stimulate the interest of the Supreme Court of the United States, or any member of it? The sing song cacophony of the petitions for writs of certiorari to this Court parade by! Each band in the monotonous parade plays loudly its tunes of—*important federal questions; conflicts in the Circuits below; and the grave effects upon the revenue—to the Government "of the people".*

The candid, if not decorous, statistics of this Court, for many years now, show the fate of many pathetically colorless taxpayer-petitions. The petitions for the Government have fared better. This Court, whether or not taxpayers' petitions are opposed by the Solicitor General—on the record, usually denies taxpayers' prayers for relief. Why this coincidence of harsh reality? For the life of some of us there seems to be no sound reason nor justice in it.

Take the simple question here. To let the decision below stand on this issue of the unfettered, outright, and over legal age, owner of shares of stock in a corporation being treated as possessed of a "future interest" in that property is to shock any American judicial conscience, as well as making bad law. And how do we of the bench and bar justify such legal hocus-pocus to the layman? Certainly we care about the effect of such matters upon the national morale and polity. Why then would not the Department of Justice join in, rather than oppose, this petition and put aright this bad rule of law promulgated by the Court of Appeals.

This counsel's friends throughout the nation offer him little comfort. They have indicated the holding on this issue in this tax case presents a weird sort of result, and, although it has no just basis in fact or law, will probably be allowed to stand.

There is a Spartan fiber which courses through the character of many American lawyers—wherever schooled or disciplined. Disillusionment is perceived by them but not permitted to dominate. Why per-

chance would some of us, for many years now, devote so much material wealth, time, professional effort, and *pro bono publico* work in the American Bar Association's Standing Committees, on Judicial Selection, Tenure and Compensation, as well as Public Relations? We lawyers who try to meet the problems of layman-lawyer relationships, seek answers for the law's delays, and the probable means of amelioration and correction of these matters, do so that misunderstandings by the public, which often bring discredit to our entire profession, may be minimized, if not resolved. Visionless, impractical, and potentially vicious judicial decisions, such as the "future interests" issue rule of law here, do untold damage to the respect for our courts and lawyers. It seems not too dramatic to state that England had its "Boston tea party"—the judges and lawyers of this country may yet have their reckoning if we do not render commonsense justice, instead of doing a lot of talking and resoluting—with our heads in the sand!

A proper rule of gift tax law with respect to "future interests" under Section 1003 (b), as applied to the facts of these Heringers' cases, is not an obscure point or a nicety in the law. The factual logic is convincing. The at point cases are few. They are cited and argued to the facts herein in the transcript, pages 98-112, and in the petitioners' briefs and in the petition for rehearing below. To again labor them in this petition would be a fruitless and inappropriate task, understandingly wearisome to this Court, and an effort of supererogation. It takes no herculean feat

of the mind to grasp the simple and essential questions involved here.

Thus, disturbing as are the realistic prospects of the successful disposition of this issue in favor of the taxpayer-petitioners, we herewith propound it.

CONCLUSION.

The writ of certiorari should be issued.

Dated, San Francisco, California,
October 3, 1956.

Respectfully submitted,
R. E. H. JULIEN,
Attorney for Petitioners.

(Appendices A, B, C and D Follow.)

Appendix A

United States Court of Appeals
for the Ninth Circuit

STEPHEN F. HERINGER, MABEL H. HERINGER, JOHN F. HERINGER, and ALTA G. HERINGER, *Petitioners,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 14,574 June 7,1956

Petition to Review Decisions of the Tax Court of the United States.

Before ORR and CHAMBERS, Circuit Judges, and MATHES, District Judge:

ORR, Circuit Judge:

John F. and Stephen Heringer and their wives Mabel H. and Alta G. respectively, and hereafter petitioners, appear from the record to be thrifty people who have conducted successful farming operations during the years. Each couple has several children. On or about January 5, 1947 petitioners concluded that the major portion of their property should be transferred to a corporation, whose stock was to be distributed between parents and children. Pursuant

thereto they caused to be incorporated Vorden Farms, Inc., hereafter the corporation. The corporation issued 50,000 shares of stock. In payment for these shares the corporation received the sum of $50,000. Petitioners each received 5000 shares, a total of 20,000 shares which constituted forty percent of the 50,000 shares issued. The two couple have eleven children, some of whom received 2500 shares while others received 3000.

On December 28, 1948 the petitioners transferred to the corporation a one half interest in certain farm lands owned by them, and on January 5, 1949 conveyed the remaining one half interest. No consideration for the transfer was given or promised. It is stipulated that the fair market value of the land is $641,443. After receipt of the land the corporation leased it to Vorden Farms, a partnership consisting of nine of the said eleven children, which said partnership operated the farming of the land. The corporation collected rents from the partnership, paid taxes and reclamation assessments and distributed dividends. Officers of the corporation received no salaries.

On these facts the Tax Court found that the said transfers constituted gifts within the intents of §§1000 and 1002, Int. Rev. Code of 1939; that the value of such gifts for purposes of tax was the full stipulated fair market value of the conveyed land, and that in determining the number of exclusions available to petitioners pursuant to §1003(b)(3), the said gifts must be deemed to have been made to the corporation,

as an entity, constituting, for purposes of §1003(b)(3), a single donee.

Petitioners attack the decision of the Tax Court on three grounds:

1. That the said transfers of land to the corporation were contributions to capital and not gifts within the meaning of the Gift Tax statute,

2. That, if it be held that gifts were made, the donees were the said children and each donor became entitled to an exclusion of $3000 for each child on each transfer,

3. That by reason of petitioners forty percent ownership of the corporation, the amount of the gift, if any, was not the fair market value of the property at the time of the transfers, but sixty percent thereof.

In support of their contention that the land transfers were not gifts, petitioners rely on certain self-serving declarations to the effect that the purpose of the said transfers was to provide for said children an incentive to work the farm more productively, thus placing the transactions in the category of transactions in the ordinary course of business and without donative intent.[1]

It was the province of the Tax Court to give such weight to this evidence as it deemed it entitled to com-

[1]Reg. 86.8 provides, in part, as follows: "However, a sale, exchange or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arms length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth."

mand.[2] Evidently it did not credit the testimony. The family context of the transactions created a presumption of gift, see 2 Paul, Estate and Gift Taxation (1942), 1113, and cases cited. It is noteworthy that petitioners' eleven children were all interested in the corporation whereas nine of them were partners in the operating partnership. This fact suggests motives other than the intention to develop an incentive in those working the land. In Comm. v. Wemyss, 1945, 324 U.S. 303, at p. 306, the Supreme Court said:

> "But, Congress intended to use the term 'gifts' in its broadest and most comprehensive sense. H. Rep. No. 708, 72nd Cong., 1st Sess. p. 27, S. Rep. No. 665, 72nd Cong., 1st Sess. p. 39. cf. Smith v. Schaughnessy, 318 U.S. 176, Robinette v. Helvering, 318 U.S. 184. Congress chose not to require an ascertainment of what too often is an elusive state of mind. For purposes of the gift tax it not only dispensed with the test of 'donative intent.' It formulated a much more workable external test, that where 'property is transferred for less than an adequate and full consideration in money or money's worth,' the excess of such money value 'shall for the purpose of the tax imposed by this title be deemed a gift . . .' "[3]

The facts of the instant case justify the finding of the Tax Court that the transfers of the land were gifts within the intent of the Act.

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[2]Comm. v. Wemyss, 1945, 324 U.S. 303, Dobson v. Comm., 1943, 320 U.S. 489.

[3]See also Helvering v. American Dental Co., 1943, 318 U.S. 322, and Horst v. Comm., 9th Cir. 1945, 150 F.2d 1.

We now take up the contention that, in the event taxable gifts were involved, the donees of such gifts, in substance, were petitioners' children rather than the corporation and that a $3000 exclusion should be allowed each donor for each. Petitioners claim support for their contention is found in the case of Helvering v. Hutchins, 1941, 312 U.S. 393. There the Supreme Court of the United States held that the taxpayer, having made a gift to a trust, was entitled to an exclusion for each beneficiary of the trust, rejecting the contention that the trust entity was the donee for purposes of §1003(b) and that hence but a single exclusion was authorized. In Thompson v. Comm., 1940, 42 B.T.A. 121, the then Board of Tax Appeals held, on facts substantially the same as those of the instant case, that the entity of the corporate donee may not be ignored. Numerous other cases, cited by respondent, have held, in various contexts, that the corporate entity controls.

But, in the instant case we need not decide the point because even though the said children be deemed the donees for purposes of application of §1003(b) the interests taken by said children were "future interests" within the meaning of the statute and petitioners are not entitled to the exclusions there provided.

In Wells v. Comm., 6th Cir. 1942, 132 F.2d 405, 407, it is said: "In considering this question it is necessary to put aside conceptions of 'estates in futuro' as understood by Blackstone and the classic commentators on the common law. . . ." The test rather is

whether or not the donee is given present power of possession and enjoyment of the gift, United States v. Pelzer, 1941, 312 U.S. 399, Ryerson v. United States, 1941, 312 U.S. 405. Absent such present power no exclusion is authorized.

Here the corporation was given title to the transferred land. Shareholders of the corporation could possess or enjoy the land or income derived therefrom only upon declaration of dividends, an act which required the joint action of members of the competent corporate body and which no single shareholder could perform. This consideration brings the case within the reasoning of the Supreme Court of the United States in the case of Ryerson v. Comm., supra. There the joint action of two donees as trustees was a condition precedent to their individual possession and enjoyment of the gift, neither having power to reach the property save by the consent of the other. The Supreme Court held that the consequent postponement and condition attached to their possession and enjoyment constituted their interests "future interests." See also United States v. Pelzer, supra, Skouras v. Comm., 2d Cir. 1951, 188 F.2d 831 and Comm. v. Wells, supra, involving a trust, the trustee of which had discretion as to distributions of income and principal to the beneficiaries.

We do not determine whether the gifts made were or were not to the children because even so they would be future interests and therefore would not entitle the donors to exclusions. Since the Government has not attacked the exclusions allowed below on the

theory that the transfers were gifts to the corporation the four exclusions allowed will not be disturbed.[4]

Petitioners held interests in the donee corporation in the amount of forty percent of the outstanding stock.[5] They contend that gifts, if any, by them to the corporation should be valued for gift purposes at sixty percent of fair market value as found by the Tax Court inasmuch as the value of petitioners' interest in the corporation was increased proportionately as a direct result of the transfers to the corporation and that such increase is analogous to receipt by them of consideration for the transfers.

Sec. 1002, Int. Rev. Code of 1939 provides as follows:

> "Where property is transferred for less than an adequate consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the taxable year."

It is important to note here that Congress considered the problem of computing the amount of gift where

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[4]See Ryerson v. Comm. supra at p. 409.

[5]We treat the interests held by petitioners in the aggregate as 40% of the corporation. Individually each petitioner held 10% of the corporation's stock, but as the gift of each petitioner must be considered to have been in part in consideration of the gifts made by the others, it is useful and not misleading to consider the aggregate holdings in determining the tax liabilities of the individual donors.

the donor receives a consideration for the transfer and determined in favor of a net result.

It is well established that the provisions of the gift tax statute are to be construed as *in pari materia* with the provisions and purposes of the estate tax statute, see e.g. Sanford's Estate v. Comm., 1939, 308 U.S. 39. It is evident that the value of petitioners' shares in the family corporation necessarily reflected proportionately the increased net worth of the corporation which increased value would be includable in petitioners' gross estates.

Giving the language of the statute its ordinary meaning petitioners' intention was to donate not more than 60% of the transferred property. Where, as here, a direct consequence of their action was to proportionately increase the value of petitioners' holdings, reason and justice require a finding that petitioners parted with no more. In so applying the statute we recognize the importance of realistic considerations, Helvering v. Hutchins, supra.

In support of its contrary contention the Government relies on Bothin Real Estate Co. v. Comm., 9th Cir. 1937, 90 F.2d 91, Weeks v. White, 1st Cir. 1935, 77 F.2d 817, and Thompson v. Comm., supra. The Bothin and Weeks cases did not arise under the gift tax provisions of the Internal Revenue Code. In each of those cases the question presented was whether and to what extent the donee took the tax basis of the transferor for the transferred property with reference to income tax consequences. Considerations pertinent to that question are not controlling here.

As we have heretofore noted the last cited case of Thompson v. Comm. involved a gift to a family corporation, which is analogous to this case. In holding that the taxpayer must be deemed to have made a gift of the full amount to the family corporation the then Board of Tax Appeals relied in part on the unsettled state of the law in the area of gifts to trusts which then existed and which the Board regarded as an *a fortiori* situation. Thereafter the Supreme Court clarified the atmosphere as to trusts, Helvering v. Hutchins, supra, by holding that the practical realities of the gift were controlling. In its later decision Scanlon v. Comm., 1940, 42 B.T.A. 997, where the taxpayer had given property to a wholly owned corporation, the board distinguished the Thompson case and held the gift tax statute inapplicable. In our opinion the Scanlon case is indistinguishable in principle from the situation presented in Thompson v. Comm. and in the instant case. It would be harsh and unrealistic to ignore the substantial interests held by the petitioners in the donee corporation.

The judgment of the Tax Court is modified to the extent that the gift tax was made to apply to the 40% interest retained by petitioners. Cause remanded with instructions to Tax Court to enter judgment in accordance with the views herein expressed.

(Endorsed:) Opinion. Filed June 7, 1956.
Paul P. O'Brien, Clerk.

Appendix B

No. 14,574

United States Court of Appeals for the Ninth Circuit

STEPHEN F. HERINGER, MABEL H. HERINGER, JOHN F. HERINGER, and ALTA G. HERINGER, *Petitioners*, vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent*.	No. 14,574

JUDGMENT

Upon Petition to Review Decisions of the Tax Court of the United States,

This cause came on to be heard on the Transcript of the Record from The Tax Court of the United States, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the decisions of the said Tax Court of the United States in this cause be, and hereby are modified to the extent that the gift tax was made to apply to the 40% interest retained by petitioners, and that this cause be, and hereby is remanded with instructions to the said Tax Court to enter Decisions in accordance with the views expressed in the opinion of this Court.

(Endorsed) Judgment

Filed and Entered: June 7, 1956

Paul P. O'Brien, Clerk.

Appendix C

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Monday, July 9, 1956

Before: Orr and Chambers, Circuit Judges, and Mathes, District Judge.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Petitioners, filed June 29, 1956, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

Appendix D

No. 14,574

In the United States Court of Appeals
For the Ninth Circuit

STEPHEN F. HERINGER, MABEL H. HERINGER, JOHN F. HERINGER, and ALTA G. HERINGER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decision of the Tax Court of the United States.

PETITION FOR REHEARING.

To the Honorable William E. Orr and Richard H. Chambers, Circuit Judges, and William C. Mathes, District Judge:

Petitioners respectfully request you grant a rehearing on your decision of June 7, 1956.

Our request is founded entirely upon the sincere belief that it is your desire to have afforded each party a full and fair hearing on all of the issues adjudicated, and to make as complete a disposition of those issues in these particular cases as is possible at the present time.

Specifically, we believe the oral argument of March 14, 1956 was, in no manner addressed by either counsel for the respondent or counsel for the petitioners to the issue or question of whether there were gifts of "future interests" as applied to the facts of the instant cases, under Section 1003 (b), 1939 I.R.C. (Op. pp. 4-5.) Nor do we recall that any one of the Judges of this Court, as constituted in the original hearing on March 14th, directed any inquiry to either counsel on this major point upon which your existing decision is partially predicated.

It is understandable and natural that this question or issue was not in focus or considered at the March 14th hearing, since the Tax Court made no reference to, nor finding of fact upon, nor decision upon it. Nor does the record before this Court indicate, in any statement of points to be relied upon by counsel for either party, that the "* * * interests taken by said children were 'future interests' within the meaning of the statute * * *" (Op. p. 4) which results in your decision of June 7th denying the $3,000 annual exclusion to each donor for each of the eleven children. It is true, that the respondent utilized in a catchall argument of a little over a page of his brief, at page 22, his generalized postulate that the "* * * gifts to the non-contributing stockholders (children), * * * would have been gifts of future interests, * * *". (If gifts to the children and not to the corporation had in fact been made.) But it is equally true that, throughout the record and oral arguments before this Court on March 14th, there was no responsive attention given to this

then apparently abandoned and, as here applicable, factually remote point. We believe that to permit your decision to stand on the present state of the record will effect an unnecessary injustice upon these petitions. Moreover, although your present opinion indicates (Op. at p. 4, and again at p. 5), that the children are the real beneficiaries or donees of these gifts, the absence of a square decision upon that crucial point will undoubtedly provoke further controversy with the government, not only by these petitioners but other taxpayers, who are awaiting your decision, as well. Your failure to decide who are the real donees point will create other problems, such as: What will be the *basis of these donors* stock; and what will be the *basis of the noncontributing shareholders* stock on a sale or other income tax realization by any of them?

So, in all humility, both as counsel for petitioners and as an officer of this honorable Court, we respectfully ask for a hearing or rehearing to brief the major point of: Whether an unfettered owner of a share or shares of common capital stock of a California corporation (the children here) is the beneficial owner of a "future interest" *under any provision of the federal gift tax statute,* any proper treasury regulation issued in pursuance thereof, or any appropriate court decision?

Realistically viewed, the petitioners' cases are clearly distinguishable, on their facts, from all of the court decisions relating to the so-called trust conditions or limitations which inveigh against certain donees having the "* * * present power of possession and en-

joyment of the gift." Petitioners' counsel has carefully reexamined all of the cited cases in these proceedings, as well as carried on further extensive legal research in this matter, with the sincere conviction that on this point they are not applicable to the Heringers' cases. All of those other cases show the donee has a future interest because of the required "joint action" of either another donee as well as himself, or the trustee as well as himself, or there is a clear postponement of his right to either or both the income and principal of the subject matter of the gift. In short, in all of the cited cases the donee may never come into possession and enjoyment let alone have a "present power" to bring about such possession and enjoyment, as here. Those cases are therefore very wide of the mark in these Heringer matters.

Basically, the "* * * present power of possession and enjoyment of the gift, * * *" (Op. p. 4) in the hands of the Heringers' children is best and most forcefully seen in their individual and unconditional power to individually and presently realize upon their individual aliquot capital interest in the assets of Vorden Farms corporation (the real measure and real subject matter of the gifts here) *by sale of their individual stock—right now!* In these circumstances it is difficult to see how one could reasonably substantiate the proposition that an outright gift of common capital stock, without any strings attached or "joint action" of anyone, is the gift of a "future interest" under section 1003 (b) or under any other applicable provision of the Internal Revenue Code relating to the

taxation gifts, *qua gifts*. Yet, is not that essentially what the respondent is asking the courts to rule in these cases at bar?

Each of the several children of the Heringers have just as much of a "present power of possession and enjoyment" of the principal and income of 60% of the stock of Vorden Farms, Inc. which they each individually own outright as do their parents who similarly own the other 40%! There are here no trust limitations or strings attached as clearly appear on the facts and as lucidly shown in the opinion of Mr. Justice Stone, who wrote all three, in the Hutchins, Ryerson and Pelzer decisions of the Supreme Court. (Your, Op. 4.) A careful reexamination of those opinions leave little doubt as to how Mr. Justice Stone would have distinguished them from the cases at bar. Cf., *A. Gregory v. The State of California*, 77 Cal. App. (2d) 26, 174 Pac. (2d) 863. Neither does the *Wells case* (Op. 4), which provided that the amount of *income and principal* to be distributed to the beneficiaries *should rest entirely in the discretion of the trustees*, come even close on the facts here. Nor does the opinion in the *Skouras* case (Op. 5) apply for there the "joint action" of the *other joint assignee* was necessary to the destruction of the joint interest in the assigned policy. Compare, *S. R. Baer*, 2 TCM 285, where, as here pertinent, the Tax Court held that the irrevocable assignments of life insurance directly to a single beneficiary are gifts of present interests. Thus, in these Heringers cases, each child stockholder individually owns his or her stock outright. There are no

trust conditions or joint action restrictions on any of these stockholders *present power* or right to principal (by sale of their stock) or income (dividends, like any other shareholder.) Stockholders so situated clearly have *present interests under the gift tax law.* To hold otherwise would distort and be disruptive of the plain understanding of every American owning a share of stock. On the nature of a stockholders interest under California law, see, *MacDermot v. Hayes,* 175 Cal. 95, at 114, 170 Pac. 616; *W. F. Boardman Co. v. Petch,* 186 Cal. 476, 199 Pac. 1047.

Certainly, no one could rationally suggest that the donor-parents have only a "future interest" in the 40% of the stock of Vorden Farms, Inc. which they each individually and severally own. *How then can each of the eleven individuals and adult children, who are in precisely the same position of severalty of ownership, be treated differently?*

Indeed, the Record discloses that the whole generic idea of these petitioners, their factual intentions, and their executed transactions, as recognized by a partial holding of this Court, point to what we believe is the inexorable conclusion that the non-contributing shareholders or children (as Congress intended) are the real donees of present and not future interests. The record also shows that, because of these circumstances, the *basis* for the children's stock is the same value per share as is the basis of the stock in the hands of the parents. To hold otherwise would be an inequitable distortion of the facts in the record.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 482

STEPHEN F. HERINGER, MABEL H. HERINGER, JOHN F. HERINGER, AND ALTA G. HERINGER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 84–89) are reported at 21 T. C. 607. The opinion of the Court of Appeals (Pet., App. A) is reported at 235 F. 2d 149.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1956. (Pet., App. B). A petition for rehearing was filed on June 29, 1956 (Pet., App. D) and was denied by the Court of Appeals on July 9, 1956 (Pet., App. C). The petition for a writ of certiorari

We shall be happy, without further belaboring this Court here or at this time to submit orally or in written memorandum form what we believe are additionally helpful, pertinent, and convincing authorities to support the foregoing views.

Dated, San Francisco, California,
June 29, 1956.

Respectfully submitted,
R. E. H. Julien,
Attorney for Petitioners.

Denied July 9, 1956
Mandate July 16, 1956

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the within petition for rehearing is well founded and is not interposed for delay.

R. E. H. Julien,
Attorney for Petitioners.

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was filed October 6, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Taxpayers, two brothers and their wives, conveyed gifts of land to a corporation of which they and their respective children were the only stockholders. The question presented is whether the Court of Appeals erred in holding the interests of the non-contributing stockholders (*i. e.*, the eleven children) to be "future interests" within the meaning of Section 1003 (b) (3) of the Internal Revenue Code of 1939, thereby precluding each donor from claiming a $3,000 exclusion for each year for each of the non-contributing stockholders and, instead, allowing each donor only one exclusion in each year for the transfer to the corporation.

STATUTES AND REGULATIONS INVOLVED

Sections 1000 (a) and (b), 1003 (b) (3), 3797 (a) (1) of the Internal Revenue Code of 1939 and Section 86.11 of Treasury Regulations 108 are printed in the Appendix, *infra*, pp. 9–10.

STATEMENT

The facts as found by the Tax Court (R. 85–88) and stated by the Court of Appeals may be summarized as follows:

Stephen F. Heringer and John F. Heringer, two brothers, and their respective wives, Mabel H. Heringer and Alta G. Heringer (hereinafter called taxpayers), together owned approximately 2,074 acres of farm land in Sacramento County, California.

On or about January 5, 1948, taxpayers caused to be incorporated Vorden Farms, Inc. (hereinafter called the corporation), for purposes of conducting a farming and agricultural business. On or about December 8, 1948, the corporation issued 50,000 shares of stock, at one dollar per share. Taxpayers each purchased 5,000 shares, a total of 20,000 shares or forty per cent of the shares issued. The two couples together have eleven children, who separately purchased, for cash, the remaining 30,000 shares; Stephen's six children each purchased 2,500 shares, while John's five children each purchased 3,000 shares.

On December 28, 1948, taxpayers transferred to the corporation a one-half interest in the farm lands owned by them and on January 5, 1949, conveyed the remaining one-half interest. No consideration for the transfer was given or promised; the fair market value of the land was $641,443.

The corporation leased the land to a partnership, comprised of nine of the eleven children, which farmed the land. The corporation collected rents from the partnership, paid taxes and assessments and distributed dividends. Officers of the corporation received no salaries. Prior to the existence of the corporation, the partnership had leased the land from the taxpayers.

Taxpayers filed gift tax returns for the years 1948 and 1949, taking the position that no taxable gift was involved; but that, if there was a gift, the donors retained a forty per cent interest in the property transferred and each donor was entitled to eleven

exclusions for gift tax purposes, *i. e.*, an exclusion for each of the non-contributing stockholders. The Tax Court rejected these alternative contentions, holding the transfer to be a taxable gift to its full extent and each taxpayer entitled to but one exclusion for each year. The Court of Appeals affirmed the Tax Court's finding that the transfers were gifts within the intent of the statute, but agreed with taxpayers' contention that the amount of the gift was not the full fair market value of the property at the time of the transfers, but only sixty per cent thereof (by reason of taxpayers' forty per cent ownership of the corporation). Finally, the Court of Appeals held the interests taken by the non-contributing stockholders to be "future interests" within the meaning of the statute and, accordingly, affirmed the Tax Court's holding that the taxpayers were not entitled to exclusions for gifts to each of the children, but that each was entitled to but one exclusion for each year.

ARGUMENT

The sole issue presented by the petition involves the number of annual exclusions to which each donor is entitled with respect to gifts made to a corporation.[1] (Pet. 4–6.) The Court of Appeals held the interests of the non-contributing stockholders to be "future

[1] The Court of Appeals decided the issue of whether the transfers in question were gifts or capital contributions in favor of the Commissioner, and taxpayers have not raised this issue in their petition to this Court. The question of the amount of the gift was decided in favor of the taxpayers, and the Commissioner has abandoned that issue.

interests" within the meaning of the statute in question, thereby precluding each donor from claiming a $3,000 exclusion for each year for each of the non-contributing stockholders and limiting each donor to one exclusion in each year for the transfer to the corporation. This holding is clearly correct and taxpayers are unable to cite any authority to the contrary. There is no conflict of decisions and there are no other grounds calling for further review.

Section 1003 (b) (3) of the Internal Revenue Code of 1939 (Appendix, *infra.* p. 9), which establishes the annual exclusion of $3,000 for each donee from the amount of taxable gifts, clearly excludes gifts of future interests in property from its provisions. As the Court of Appeals correctly noted, the term "future interests," as used in the statute, is not to be considered as limited to the classic concepts of the common law. The test is whether the donee is given present power of possession or enjoyment of the gift, or must wait for some future time for such possession or enjoyment. *United States* v. *Pelzer,* 312 U. S. 399; *Ryerson* v. *United States,* 312 U. S. 405; *Commissioner* v. *Wells,* 132 F. 2d 405 (C. A. 6th); *Fisher* v. *Commissioner,* 132 F. 2d 383 (C. A. 9th). See Treasury Regulations 108, Sec. 86.11 (Appendix, *infra,* p. 10).

Here the gift was to the corporation, and the shareholders could possess or enjoy the land or income therefrom only upon the occurrence of some future event, *e. g.,* the declaration of dividends by the corporation, the liquidation of the corporation, or sale

of the stock. Furthermore, the declaration of dividends required the joint action of members of the corporate body. This provided a further condition and element of postponement of possession and enjoyment of the gift. See *Ryerson* v. *United States, supra.* The taxpayers, having elected to do business as a corporation and to transfer the land to the corporation, must accept the tax disadvantages of their action. See *Gray* v. *Powell,* 314 U. S. 402, 414; *Higgins* v. *Smith,* 308 U. S. 473, 477.

Taxpayers contend that since the Court of Appeals held that the value of taxpayers' holdings was proportionately increased as a direct result of the gift to the corporation, it follows that the value of the holdings of the non-contributors likewise increased. Therefore, they argue, their interests must be deemed present rather than future. (Pet. 4–5.) The fallacy of this reasoning is apparent. The question of the increase in value of the donors' stock was considered for the purpose of determining whether the amount of the gift was the full fair market value of the property or sixty per cent thereof, *i. e.,* whether the donors in effect received consideration in the amount of forty per cent of the value of the property. The Court of Appeals, in deciding this question in favor of taxpayers, viewed the problem in connection with the provisions and purposes of the estate tax statute, and held that the taxpayers' intention was to donate sixty per cent of the property and that they parted with no more. The question of the number of allowable exclusions, however, involves an entirely different

issue, *i. e.*, whether the donees have the present power of possession and enjoyment of the property. There can be no doubt that the book and economic value of the stock held by the non-contributing stockholders increased by reason of the gift as did that of the taxpayers; but it does not follow that the interests of the stockholders are present, rather than future, within the meaning of the statute. For the reasons already discussed, the interests are clearly future and the decision with respect to the exclusions correct.

Taxpayers' contention (Pet. 5–6) that the only appropriate issue for adjudication before the Court of Appeals was whether the noncontributing shareholders were the real and intended donees[2] and that the court erred in considering the issue of "future interests" is likewise without merit. The Commissioner was free to urge any matter appearing in the record in support of the judgment and to sustain such judgment upon any valid legal ground. *Ryerson* v. *United States, supra; LeTulle* v. *Scofield,* 308 U. S. 415; *Helvering* v. *Gowran,* 302 U. S. 238. The statutory provision under which taxpayers seek the exclusions in question (Section 1003 (b) (3) of the Internal Revenue Code of 1939) clearly sets forth the legal ground relied upon by the Court of Appeals in denying the exclusions, and the record amply supports the findings of fact on this point. The "future interests" contention was fully set forth by the Commis-

[2] The Court of Appeals found it unnecessary to rule upon the factual question of whether the children were the intended donees (R. 128, 129).

sioner in his brief before the Court of Appeals and taxpayers did not seek to refute it (Pet. 5) until after the court's decision, when taxpayers filed a petition for rehearing (Pet., App. D).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
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A. F. PRESCOTT,
SHELDON I. FINK,
Attorneys.

NOVEMBER, 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift. Gift taxes for the calendar years 1932–1939, inclusive, shall not be affected by the provisions of this chapter, but shall remain subject to the applicable provisions of the Revenue Act of 1932, except as such provisions are modified by legislation enacted subsequent to the Revenue Act of 1932.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a non-resident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

(26 U. S. C. 1952 ed., Sec. 1000.)

SEC. 1003. NET GIFTS.

* * * * *

(b) *Exclusions from Gifts.*

* * * * *

(3) [as added by Section 454, Revenue Act of 1942, c. 619, 56 Stat. 798] *Gifts after 1942.*—In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1943 and subsequent calendar years, the first $3,000 of such gifts to such person shall not, for the pur-

poses of subsection (a), be included in the total amount of gifts made during such year.

(26 U. S. C. 1952 ed., Sec. 1003.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

(1) *Person.*—The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, company, or corporation.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3797.)

Treasury Regulations 108, promulgated under the Internal Revenue Code of 1939:

SEC. 86.11 *Future Interests in Property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. The term has no reference to such contractual rights as exist in a bond, note (though bearing no interest until maturity), or in a policy of life insurance, the obligations of which are to be discharged by payment in the future. But a future interest or interests in such contractual obligations may be created by the limitations contained in a trust or other instrument of transfer employed in effecting a gift. For the valuation of future interests, see section 86.19 (*g*).

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